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U

ICT OF CALIFORNIA

TINA R. HARO, et al.,
Plaintiff,

v.

CITY OF LOS ANGELES
Defendant.

No. CV 02-9587 CBM (SHx)

ORDER: (1) GRANTING
PLAINTIFFS' MOTIONS FOR
SUMMARY JUDGMENT; AND (2)
DENYING DEFENDANT'S
MOTIONS FOR SUMMARY
JUDGMENT

The matters before the Court are Cross-Motions for Summary Judgment in *Ackley et al. v. City of L.A.* and *Haro et al. v. City of L.A.*¹ The Parties do not dispute the facts. [*Ackley* Docket No. 100; *Haro* Docket No. 133]. Accordingly, there are no material issues of fact for a jury to resolve and the Court's rulings on these issues will be dispositive.

BACKGROUND

The *Ackley* and *Haro* Plaintiffs (collectively, "Plaintiffs") are sworn

¹ In total, there are four Motions before the Court: (1) *Ackley* Plaintiffs' Motion for Summary Judgment [*Ackley* Docket No. 131]; (2) *Haro* Plaintiffs' Motion for Summary Judgment [*Haro* Docket No. 99]; (3) City of Los Angeles's Motion for Summary Judgment in *Ackley* [*Ackley* Docket No. 132]; and (4) City of Los Angeles's Motion for Summary Judgment in *Haro* [*Haro* Docket No. 97].

1 employees of the City of Los Angeles's Fire Department. For overtime purposes,
2 Defendant improperly treated Plaintiffs as employees "in fire protection activities"
3 under 29 U.S.C. Sections 203(y) and 207(K). Accordingly, Plaintiffs were paid
4 using a twenty-seven (27) day 204-hour Fair Labor Standards Act overtime
5 threshold. Stipulated Facts ("SF") at ¶ 1. Plaintiffs regularly worked nine 24-hour
6 shifts every 27-day work period, totaling 216 hours. *Id.* at ¶ 4. Plaintiffs were paid
7 using a fourteen (14) day pay period that began at 12:00 a.m. on a Sunday and
8 ended at 12:00 a.m. on a Sunday. *Id.* at ¶ 12. Plaintiffs received overtime
9 payments pursuant to the terms of a collective bargaining agreement ("CBA"). *Id.*
10 at ¶ 5. Overtime payments were paid at a rate of one and one-half the regular rate
11 for all hours worked at off-d

12
13 . *Id.* at ¶ 10.

14 On November 30, 2009, this Court granted summary judgment on liability in
15 favor of Plaintiffs, finding that Plaintiffs are: "(1) not 'responsible for fire
16 suppression' within the meaning of Section 203(y); and (2) are entitled to be paid
17 overtime for all hours worked in excess of forty (40) hours per week, pursuant to
18 Section 207(a) of the FLSA." [*Ackley* Docket No. 105; *Haro* Docket No. 89]. The
19 Court found that Plaintiffs are entitled to recover three years of overtime back pay
20 and liquidated damages of three years of double overtime back pay. [*Ackley*
21 Docket No. 105; *Haro* Docket No. 89].

22 The parties have agreed on a calculation method for determining the
23 overtime amount that Plaintiffs are entitled to. The sole issue in the instant
24 Motions is the appropriate methodology for offsetting/crediting overtime
25 compensation already paid by Defendant to Plaintiffs.

26 STANDARD OF LAW

27 Summary judgment against a party is appropriate when "the pleadings,
28 depositions, answers to interrogatories, and admissions on file, together with the

1 affidavits, if any, show that there is no genuine issue as to any material fact and
 2 that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P.
 3 56(c).

4 DISCUSSION

5 Pursuant to the FLSA, 29 U.S.C. §207(h)(2), an employer may credit some
 6 payments made to employees against the overtime owed to them under the FLSA
 7 overtime rules. The FLSA does not, however, specify the calculation method for
 8 crediting such payments. The text of the Act simply states that “[e]xtra
 9 compensation . . . shall be creditable toward overtime compensation payable
 10 pursuant to this section.” 29 U.S.C. §207(h)(2).

11 Accordingly, the parties advance four different calculation methods.
 12 Defendant contends that the overtime credits and offsets should be viewed as a
 13 whole and applied cumulatively over the entire period for which Plaintiffs claim
 14 liability. In the alternative, Defendant contends that the credits and offsets should
 15 be applied within Defendant’s established 27 day work period, or, as a final option,
 16 on a two week pay period basis. Plaintiffs advance one calculation method, that
 17 credits and offsets must be applied on a workweek by workweek basis.

18 The Ninth Circuit has not addressed whether overtime credits and offsets are
 19 to be applied cumulatively or within a single pay period or workweek. Other
 20 courts are divided on the issue. The Sixth and Seventh Circuits have held that
 21 §207(h)(2) should be limited to the same workweek or work period in which the
 22 payments were made. *Herman v. Fabri - Centers of Am.*, 308 F.3d 580, 590 (6th
 23 Cir. 2002); *Howard v. City of Springfield, Ill.*, 274 F.3d 1141, 1149 (7th Cir.
 24 2001).² The Fifth and Eleventh Circuit have held that offsets under §207(h)(2) may

25
 26 ² Several district courts have reached the same conclusion. See *Nolan v. City of Chicago*, 125 F.
 27 Supp. 2d 324, 331-33 (N.D. Ill. 2000) (holding that “the offsets should be calculated on a period
 28 by period basis”); see also *Conzo v. C* . 2d 279, 291 (S.D.N.Y. 2009)
 (holding that “FLSA credit may be applied to offset overtime liability only within the work
 period in which it accrued”); see also *Bell v. Iowa Turkey Growers Cooperative*, 407 F. Supp.

1 be applied cumulatively. *S* . 2003);
2 *Kohlheim v. Glynn County, Ga.*, 915 F.2d 1473, 1481 (11th Cir. 1990).

3 The Sixth and Seventh Circuits have concluded that extra payments under §
4 207(h)(2) may only be applied within the same workweek in which they were paid.
5 *Herman*, 308 F.3d at 590; *Howard*, 274 F.3d at 1149. The Seventh Circuit found
6 that “[b]ecause the statute contemplates that overtime will be paid and calculated
7 on a pay period basis, it is consistent with that language to calculate and apply
8 credits in the same manner.” *Howard*, 274 F.3d at 1149 (citing 29 C.F.R. §
9 778.202(c) (credits may be given for daily compensation “against the overtime
10 compensation which is due under the statute for hours in excess of 40 hours in that
11 workweek”). Additionally, the Seventh Circuit noted that if cumulative offsets
12 were allowed, an “employer could manipulate the payments to suit its economic
13 terms.” *Howard*, 274 F.3d at 1149. Thus, “[t]hat interpretation is completely
14 divorced from the purpose of the FLSA.” *Id.* The *Howard* Court reasoned that the
15 purpose of the FLSA is “to protect workers from the twin evils of excessive work
16 hours and substandard wages.” *Id.* at 1148.

17 In *Herman*, upon an extensive review of § 207(h)(2)’s legislative history, the
18 Sixth Circuit concluded that “the legislative history of the statute supports the
19 notion that the workweek or work period is central to an understanding of §
20 207(h)(2).” 308 F.3d at 588. The Sixth Circuit also found that “[a]n analysis of the
21 FLSA as a whole and its implementing regulations . . . favors [the] view that §
22 207(h)(2) should be interpreted to include a workweek or work period restriction.”
23 *Id.* at 589. The Sixth Circuit found that the Ninth Circuit opinion in *Biggs v.*
24 *Wilson*, 1 F.3d 1537 (9th Cir. 1993), supported its holding that § 207(h)(2) offsets
25 should be applied to a workweek or work period. In *Biggs*, after reviewing the
26 statutory scheme of the FLSA, the Ninth Circuit concluded that § 206(a) should be

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28 1051, (S.D. Iowa 2006) (agreeing with the “courts that have held that credit may only be applied
within a pay period” after “careful consideration” of those cases).

1 applied with the workweek standard as a reference point. *Id.* The *Herman* Court
2 found that “[t]he same reasoning for using the workweek or work period standard
3 also applies with respect to § 206(a) since it compels employers to make timely
4 payments of overtime in conformity with the Act.” *Herman*, 308 F.3d at 591.

5 Upon review of the cases, the Court adopts the reasoning of the Sixth and
6 Seventh Circuits and finds that § 207(h)(2) credits/offsets must be applied on a
7 workweek by workweek basis.

8 **CONCLUSION**

9 For the foregoing reasons, the Court GRANTS summary judgment in
10 favor of Plaintiffs [*Ackley* Docket No. 131; *Haro* Docket No. 99], and
11 DENIES Defendant’s motions for summary judgment. [*Ackley* Docket No.
12 132; *Haro* Docket No. 97]. Accordingly, Defendant is entitled to offsets/
13 credits for overtime already paid using a workweek by workweek
14 calculation.

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16 IT IS SO ORDERED.

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20 DATED: April 18, 2011

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22 By _____

23 CONSUELO B. MARSHALL
24 U S DISTRICT JUDGE
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TERMED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TINA A. HARO, JAMES A. PITILLO,	)	Case No. CV 02-9587 CBM
JOHN BOYD, et al,	)	
	)	
Plaintiffs,	)	
v.	)	JUDGMENT
CITY OF LOS ANGELES, etc.	)	
	)	
Defendant.	)	

This action came on for decision before the Court on facts stipulated by the parties, Honorable Consuelo B. Marshall, United States District Judge, presiding, and the issues having been duly decided and findings and conclusions having been duly rendered,

IT IS ORDERED AND ADJUDGED that the following plaintiffs recover of the defendant back wages and liquidated damages in the amounts set forth in the following schedule:

Plaintiff	Back Wages	Liquidated Damages
1. Armendariz, Ruben	\$75,835.53	\$75,835.53
2. Brown, Frank	\$47,070.24	\$47,070.24
3. Carmona, Ivan	\$21,863.30	\$21,863.30

1	4.	Dawson, Kenneth	\$109,202.54	\$109,202.54
2	5.	Gillenwater, Donald	\$107,052.57	\$107,052.57
3	6.	Goldsworthy, James	\$32,576.18	\$32,576.18
4	7.	Gonzalez, Robert	\$96,494.94	\$96,494.94
5	8.	Gutierrez, Paul	\$51,806.29	\$51,806.29
6	9.	Koller, Karl	\$29,842.64	\$29,842.64
7	10.	Limon, Michael	\$123,733.61	\$123,733.61
8	11.	Marek, Patrick	\$50,662.56	\$50,662.56
9	12.	Martinez, Miguel	\$108,740.20	\$108,740.20
10	13.	Matamoros, Eddie	\$65,480.26	\$65,480.26
11	14.	Molina, Ricardo	\$92,836.12	\$92,836.12
12	15.	Naeole, Alan	\$17,393.54	\$17,393.54
13	16.	Nguyen, Tony Tran	\$65,897.09	\$65,897.09
14	17.	Palma, Michael	\$109,805.73	\$109,805.73
15	18.	Pilato, Brandi	\$65,527.59	\$65,527.59
16	19.	St. Georges, Joseph	\$26,569.22	\$26,569.22
17	20.	Skubik, Arthur	\$66,221.85	\$66,221.85
18	21.	Stafford, Thomas	\$1794.51	\$1794.51
19	22.	Steiner, Carey	\$57,911.54	\$57,911.54
20	23.	Stone, Ervin	\$35,017.81	\$35,017.81
21	24.	Torres, Moises	\$77,434.36	\$77,434.36
22	25.	Vargas, Carlos	\$130,075.85	\$130,075.85
23	26.	Weisehan, Wayne	\$105,676.97	\$105,676.97
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25		Totals:	\$1,772,523.04	\$1,772,523.04
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27 Dated: December 09, 2011

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HON. CONSUELO B. MARSHALL

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11
12 DANIEL P. ACKLEY, et al.,

13 Plaintiffs,

14 vs.

15 CITY OF LOS ANGELES,

16 Defendant.
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CASE NO. CV 04-04334 CBM (SHx)

JUDGMENT

18
19 This action came on for decision before the Court on facts stipulated by the
20 parties, Honorable Consuelo B. Marshall, United States District Judge, presiding,
21 and the issues having been duly decided and findings and conclusions having been
22 duly rendered,

23 IT IS ORDERED AND ADJUDGED that the following plaintiffs recover of
24 the defendant back wages and liquidated damages in the amounts set forth in the
25 following schedule:

26	Plaintiff	Back Wages	Liquidated Damages
27			
28	1. Acevedo, Gregory J.	\$74,487.28	\$74,487.28

1	2.	Alvarez, Angel E.	\$39,989.05	\$39,989.05
2	3.	Araiza, Randall	\$54,105.39	\$54,105.39
3	4.	Bloch, Steve	\$61,492.77	\$61,492.77
4	5.	Brass, Randall W.	\$60,403.77	\$60,403.77
5	6.	Burgess, Kevin A.	\$21,864.90	\$21,864.90
6	7.	Camacho, Alfred	\$4,995.07	\$4,995.07
7	8.	Camunas, Jose R.	\$53,625.16	\$53,625.16
8	9.	Carrasco, Ramon S.	\$30,878.12	\$30,878.12
9	10.	Coleman, Joseph	\$19,473.96	\$19,473.96
10	11.	Crawford, Ricky D.	\$84,230.12	\$84,230.12
11	12.	Ducat, William D.	\$79,706.42	\$79,706.42
12	13.	Duque, Enrique C.	\$42,776.67	\$42,776.67
13	14.	Faulkner, Daniel J.	\$36,771.34	\$36,771.34
14	15.	Flores, Pablo	\$52,830.66	\$52,830.66
15	16.	Gaeta, Gus	\$49,267.21	\$49,267.21
16	17.	Garcia, Cesar A.	\$36,884.98	\$36,884.98
17	18.	Garza, Dionisio L.	\$82,372.88	\$82,372.88
18	19.	Gasbarri, Henry M.	\$34,936.18	\$34,936.18
19	20.	Gonzalez, Juan	\$75,002.43	\$75,002.43
20	21.	Gordon, George G.	\$51,070.87	\$51,070.87
21	22.	Graciano, Enrique	\$63,916.61	\$63,916.61
22	23.	Grijalva, David	\$14,577.61	\$14,577.61
23	24.	Gutierrez, Rudy	\$48,572.04	\$48,572.04
24	25.	Igawa, Diana	\$73,332.21	\$73,332.21
25	26.	Johnson, Matt	\$75,561.68	\$75,561.68
26	27.	Karratti, Eldon A.	\$36,322.49	\$36,322.49
27	28.	Lazar, Scott	\$29,361.43	\$29,361.43
28	29.	Lemus, Alexander	\$36,652.46	\$36,652.46

1	30.	Lenske, Shawn	\$ 0.00	\$ 0.00
2	31.	Maldonado, Julio	\$81,328.95	\$81,328.95
3	32.	Manresa, Cecil J.	\$110,913.90	\$110,913.90
4	33.	Marez, Juan M.	\$45,954.73	\$45,954.73
5	34.	Martinez, Manuel	\$19,518.94	\$19,518.94
6	35.	Martinez, Oscar	\$21,522.87	\$21,522.87
7	36.	Mena, Eduardo L.	\$86,601.37	\$86,601.37
8	37.	Mena, Ricardo I.	\$57,960.63	\$57,960.63
9	38.	Mendoza, Joe Louis	\$88,329.22	\$88,329.22
10	39.	Miranda, David R.	\$10,033.12	\$10,033.12
11	40.	Olmedo, Gabriel	\$ 9,991.08	\$ 9,991.08
12	41.	Porrata, Tony	\$75,357.77	\$75,357.77
13	42.	Rivera, Kristina	\$ 9,877.29	\$ 9,877.29
14	43.	Rodriguez, Miguel	\$71,778.02	\$71,778.02
15	44.	Sanchez, Jose R.	\$25,886.09	\$25,886.09
16	45.	Saunders, Orin	\$16,458.52	\$16,458.52
17	46.	Scarvers, Cathleen	\$63,152.62	\$63,152.62
18	47.	Spencer, Susan Rae	\$ 6,549.36	\$ 6,549.36
19	48.	Thompson, Craig J.	\$28,344.99	\$28,344.99
20	49.	Torrez, Edward	\$60,042.77	\$60,042.77
21	50.	Valles, Robert A.	\$42,472.22	\$42,472.22
22	51.	Vargas, Alberto	\$22,594.83	\$22,594.83
23	52.	Wold, Cheromee B.	\$41,569.10	\$41,569.10
24	53.	Zajorac, Ljubomir	\$30,288.34	\$30,288.34
25		Totals:	\$2,451,988.49	\$2,451,988.49

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27 Dated: _____

28 HON. CONSUELO B. MARSHALL